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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 728

ERNEST HENNINGER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD S. BARLOCK
WALTER L. GERASH
509 Denver U. S. Center
1700 Broadway
Denver, Colorado 80202

Counsel for Petitioner

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on September 16, 1965.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals, printed in Appendix B hereto, infra. p. 6, is reported in 350 Fed. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1965 (Appendix B). A petition for rehearing was denied on October 8, 1965 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether a person obtaining a loan accepted by the Federal Housing Administration is guilty of a felony in violation of 18 U.S.C. Section 1010, even though there is no proof that the government relied on any statements made in a false application and notwithstanding the fact that reliance by the government or any other institution or person is in no way considered a requirement of conviction and in spite of the fact that the statements did not result in defrauding the government or anyone else.

STATUTE INVOLVED

The statutory provision involved is 18 U.S.C. Section 1010 and is printed in Appendix A, infra. p. 5.

CONSTITUTION INVOLVED

Amendment V:

". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law . . ."

STATEMENT

Petitioner was found guilty after trial to a jury upon each of three counts of an information charging violations of 18 U.S.C. Section 1010. The jurisdiction of the district court was invoked because the case arises under 18 U.S.C. Section 1010.

The government offered evidence of petitioner having made false statements in applications for Title 1, F.H.A. home improvement loans.

The Court of Appeals in its opinion, Appendix B, infra. p. 6, affirmed the judgment on the basis of the holdings in *Cohen* v. *United States,* 6 Cir., 178 F. 2d 588, Cert. denied, 339 U.S. 920; *Bins* v. *United States,* 5 Cir., 331 F. 2d 390, Cert. denied, 379 U.S. 880; *Brilliant* v. *United States,* 8 Cir., 297 F. 2d 385, Cert. denied, 369 U.S. 871; *United States* v. *Pesano,* 2 Cir., 293 F. 2d 229.

REASONS FOR GRANTING THE WRIT

The United States Supreme Court has consistently denied certiorari in this type of case, and it is now necessary for the government to prove no more than a false statement with intent to influence the Federal Housing Administration. The statements do not have to have any influence on the Federal Housing Administration or upon anyone else.

This law, in effect, denies the accused the right to establish as a defense that the statements were mere formalities and in no way resulted in defrauding the United States or any other entity or person.

As Justice William O. Douglas stated: "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." *United States* vs. *Wunderlich*, 342 U.S. 98, dissenting opinion at 101.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD S. BARLOCK
WALTER L. GERASH

509 Denver U. S. Center
1700 Broadway
Denver, Colorado 80202

Counsel for Petitioner

APPENDIX A

Title 18 U.S.C. Section 1010

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

APPENDIX B

OPINION

Appeal from the United States District Court

for the District of Colorado

Sidney H. Tellis (Louis Boggio was with him on the brief) for Appellant.

Milton C. Branch, Assistant United States Attorney, (Lawrence M. Henry, United States Attorney, was with him on the brief) for Appellee.
Before LEWIS, BREITENSTEIN and HILL, Circuit Judges.

LEWIS, Circuit Judge.

Appellant was found guilty after trial to a jury upon each of three counts of an information charging violations of 18 U.S.C. § 1010 by making false statements in applications for Title I, F.H.A. home improvement loans. He appeals, contending that it was incumbent upon the United States to prove, as an element of the crimes, that his admittedly false statements actually influenced the Federal Housing Administration to insure the loans. The subject statute, 18 U.S.C. § 1010 provides in pertinent part:

> "Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance * * * or for the purpose of influencing in any way the action of such Administration, makes,

passes, utters, or publishes any statement, knowing the same to be false, * * * shall be fined * * * or imprisoned * * *."

The clear wording of the statute indicates that the essence of the crime lies in the making, passing, uttering, or publishing of a false application with the intent to influence the Administration and is not dependent upon the accomplishment of that purpose. *Cohen* v. *United States,* 6 Cir., 178 F_2 588, cert. denied, 339 U.S. 920; *Bins* v. *United States,* 5 Cir., 331 F_2 390, 392, cert. denied, 379 U.S. 880. The crime is one of subjective knowledge and intent and requires no defrauding of the government nor reliance upon the part of its officials. See *Brilliant* v. *United States,* 8 Cir., 297 F_2 385, 389, cert. denied, 369 U.S. 871; *United States* v. *Pesano,* 2 Cir., 293 F_2 229, 231. Appellant's contrary contention is without merit.

Although no instruction of the court was objected to, appellant now characterizes the instructions as "vague, uncertain, and erroneous." We have examined the court's charge for clear error, find none, and consider the instructions to be specific, certain and correct.

The judgment is affirmed.

APPENDIX C

Order denying petition for rehearing

Seventeenth Day, September Term,
Friday, October 8th, 1965.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[On October 14, 1965, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

[An order was entered on October 25, 1965, recalling the mandate and staying it for a period of twenty days from October 25, 1965.]

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No. 728

ERNEST HENNINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6-7; C.A.R. 3)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1965 (C.A.R. 4). A petition for re-

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[1] "C.A.R." refers to the proceedings in the court of appeals; "R." to the printed transcript of the record.

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hearing was denied on October 8, 1965 (C.A.R. 5-6; Pet. App. 8). The petition for a writ of certiorari was filed on November 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted under 18 U.S.C. 1010 for making false statements in applications for home improvement loans although there was no direct evidence that the statements influenced the Federal Housing Administration to insure the loans.

STATUTE INVOLVED

18 U.S.C. 1010, 62 Stat. 751, provides in pertinent part as follows:

> Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance * * * or for the purpose of influencing in any way the action of such Administration, makes, passes, or publishes any statement, knowing the same to be false, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

Petitioner was convicted in a jury trial in the United States District Court for the District of Colorado on three counts of an information charging violations

of 18 U.S.C. 1010 for making false statements in applications for Title I, Federal Housing Administration home improvement loans in that he failed to list all of his debts (R. 2-4). He was given concurrent sentences of imprisonment for two years, all except four months of which was suspended, and was placed on probation for a period of two years following his release. He was also fined $500 on Count I (R. 4-5). On appeal (R. 5-6) the conviction was affirmed (C.A.R. 4).

On the three dates involved in the information (Count I, December 8, 1958 (R. 7-8), Count II, September 18, 1959 (R. 17), Count III, November 21, 1960 (R. 9)) petitioner made application for, and was granted, F.H.A. home improvement loans by two banks. In the credit applications in which petitioner was asked to list all of his debts owing to lending agencies, petitioner, by his own admission (R. 33-44),[2] failed to list certain debts that he owed at the time the requested loans were granted (R. 21-23, 27, 28, 29, 30, 31, 32, 33). After petitioner had defaulted in payment on the three loans and the banks had sent in claims for reimbursement, the F.H.A. paid for the losses on the loans covered by F.H.A. insurance (R. 9-10, 18).

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[2] Petitioner testified that he did not list all his creditors since there was not room enough on the credit application form and the banks already had financial statements as to loans owing on his real estate properties (R. 35).

ARGUMENT

Petitioner's conviction was proper even though there was no direct evidence that his false statements as to his debts were a "but for" cause of the F.H.A.'s undertaking to insure the loans. The essence of the crime charged was the uttering and publishing of the false statements with intent to influence the F.H.A. *Cohen* v. *United States*, 178 F. 2d 588, 591 (C.A. 6), certiorari denied, 339 U.S. 920; *Bins* v. *United States*, 331 F. 2d 390, 392 (C.A. 5), certiorari denied, 379 U.S. 880. See *Kay* v. *United States*, 303 U.S. 1. On the evidence, the jury could reasonably find that the unpaid debts were concealed with intent to influence the action of the F.H.A., which, of course, might have refused to insure the loans had it received all of the relevant information for which it called. No more was required. *United States* v. *Pesano*, 293 F. 2d 229, 231 (C.A. 2).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

DECEMBER, 1965.

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